INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
A. The Board's findings of fact	3
B. The Board's decision and order	9
C. The court of appeals decision	11
Argument	11
Conclusion	17

CITATIONS

Cases:

Building Service Employees Union v. *Gazzam*, 339 U.S. 532	16
Electrical Workers v. *National Labor Relations Board*, 341 U.S. 694	16
Federal Trade Commission v. *Minneapolis-Honeywell Co.*, 344 U.S. 206	11
Local 761, International Union of Electrical Workers v. *National Labor Relations Board (General Electric Co.)*, 366 U.S. 667	15
McLeod v. *Local 239, Teamsters*, 179 F. Supp. 481	10
National Labor Relations Board v. *Drivers Local No. 639 (Curtis Bros.)*, 362 U.S. 274	14
Teamsters v. *Vogt*, 354 U.S. 284	16

606818—61——1

Statutes:

National Labor Relations Act, as amended (61 Stat. 136. 73 Stat. 541, 29 U.S.C. 151, *et seq.*:)

Page

Section 8(b)(7)..... 2, 3, 8, 9, 11, 12, 13, 14, 15, 16

Section 9(c)..... 4

Section 10(l)..... 10

28 U.S.C. 210(c)..... 11

Miscellaneous:

105 Cong. Rec. 14348; II Leg. Hist. of the Labor-Management Reporting and Disclosure Act of 1959, p. 1523..... 14

105 Cong. Rec. 18153; II Leg. Hist. 1812..... 13

105 Cong. Rec. 19772; II Leg. Hist. 1858..... 12

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 260

LOCAL 239, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. 17–26) is reported at 289 F. 2d 41. The Board's decision and order (R. 8–54)[1] are reported at 127 N.L.R.B. 958.

JURISDICTION

The decision of the court of appeals was issued on April 17, 1961, and a decree was entered on May 4, 1961 (Pet. 17, 27–28). The petition for cer-

[1] "R" refers to the Joint Appendix filed with the court below.

tiorari was filed on July 26, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board, in determining whether certain picketing was in violation of Section 8(b)(7)(C) of the National Labor Relations Act because conducted for more than "a reasonable period of time" without a petition for a representation election having been filed, could properly take into account the length of time the union had been picketing prior to the effective date of Section 8(b)(7)(C).

2. Whether Section 8(b)(7) may properly be interpreted to encompass peaceful picketing for recognition or organizational purposes.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 541, 29 U.S.C. 151, *et seq.*) are as follows:

> Section 8 * * *
>
> (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * * *
>
> (7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor or-

ganization is currently certified as the representative of such employees: * * *

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services. * * *

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

On September 14, 1939, Samuel Krieger, business agent of petitioner Local 239 (herein "the Union"), called on Allan Jay, president of Stan-Jay Auto Parts and Accessories Corporation (herein "the Company") (R. 22–23; 59–60). Krieger informed Jay that the Union was engaged in an organizational drive in the industry, that other jobbers had signed

up, and now his "turn had come" (R. 23; 92, 60–61). Krieger stated that the purpose of his visit was to have Jay sign a collective bargaining contract with the Union and that "they meant business" (R. 23–24; 60).[2] Jay stated that, if his employees expressed the desire to have the Union represent them, the Company would then consider a contract. Krieger replied that he did "business" directly with the employer and was "not worried about the men" (R. 23; 61). When Jay refused to "sign up" Krieger warned, "If you don't join up, we will throw a picket line up and you get no stuff, no deliveries, and you are out of business" (R. 24; 61). Krieger showed Jay the Union's standard contract and warned him that he "had better sign it" (R. 24; 62, 172–199).[3] Jay refused to sign. The Union left the contract with him, inscribing the following notation thereon: "These are the terms and conditions we hope to win for your employees" (R. 24; 62–64, 172).

On September 21, 1959, the Union began picketing the Company's premises (R. 11, 25; 56). The picketing was conducted every day, during business hours, until January 15, 1960 (R. 11, 29; 56, 88). About an hour after the picketing began, Krieger asked the

[2] The Company's employees have never been represented by any labor organization (R. 22; 59). Further, petitioner conceded that none of the employees ever joined the Union or designated it as bargaining representative. Petitioner also conceded that it has never filed a petition under Section 9(c) of the Act, seeking representation rights among the Company's employees (R. 22; 56–57).

[3] The contract included a provision recognizing the Union as "sole and exclusive bargaining agent for all employees" and contained a union shop clause (R. 24; 173).

Company's vice president and treasurer, Donald M. Marcote, when the Company was "going to join the Union" (R. 25; 96–98). Krieger stated that Marcote could force the employees into the Union and proposed a "deal." In exchange for the Company's agreement to "join now," the Union would require that only two of the existing employees become union members, but "if [it] waited and didn't join now, then everyone would have to belong to the Union" (R. 25; 98–99). Marcote rejected Krieger's proposal (*ibid.*).[4]

On November 20, 1959, a week after the provisions of Section 8(b)(7) of the Act (pp. 2–3, *supra*) became effective, and after the picketing had been in progress for two months, Krieger proposed the above "deal" to President Jay, making it clear that if Jay rejected the proposal the picketing would continue (R. 26; 71–72). Conversely, Krieger promised that if the "deal" were accepted the Union would withdraw its picket line and proceed instead against a nearby unorganized competitor of the Company (*ibid.*). When Jay pointed out that two employees had expressed their opposition to the Union,[5] Krieger reiterated that the minimal basis upon which the Union would be willing to terminate the picketing would be the Company's acceptance of a collective bargaining agree-

[4] That same day, one of the pickets warned Marcote that if he "had any money in the business [he] had better get it out fast because [he] would lose it" (R. 99).

[5] On November 20, 1959, the Company staff consisted of Jay, his partner Marcote, four regular employees, and a part-time bookkeeper (R. 89–90).

ment covering two of its existing employees, together with a union shop clause which would require employees hired in the future to join the Union after 30 days of employment (R. 26; 72–73). Jay rejected the Union's demand (R. 73).

Except at its early stages,[6] the picketing was orderly and peaceful (R. 11, 27; 64–66, 71, 101). The pickets carried placards, shouted derogatory slogans concerning the Company, directed customers to competitors' stores, and distributed leaflets urging the Company's employees to join the Union and urging the Company's customers to patronize establishments represented by the Union (R. 27; 66–68, 118, 201–204).[7] From the inception of the picketing until after November 24, 1959, the signs carried by the pickets read as follows (sometimes with the words "is stingy" added after "Stan-Jay") (R. 28–29; 57, 65, 68–69, 119–120, 207):

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[6] The Company was forced to summon police assistance during the early weeks of the picketing because pickets blocked ingress to the Company's premises (R. 27; 64–65, 100).

[7] The first leaflet appeared on September 21, 1959, the first day of the picketing (R. 27; 67), and read in part (R. 201): "We appeal to Stan-Jay workers to place the interests of their families ahead of their employers by joining the ranks of the men and women in the organized parts industry. JOIN LOCAL 239! IMPROVE YOUR WORKING CONDITIONS! DEMAND UNION WAGES AND UNION WORKING CONDITIONS IN A UNION SHOP!" The leaflet closed with an appeal "to the public" to patronize "Local 239 shops" and included therein "a partial list of Local 239 shops in this area" (R. 201–203). During the course of the picketing, the Union distributed other leaflets (R. 27; 67–68, 204).

LOCAL 239, I.B. of T.

WANTS THE EMPLOYEES OF

STAN-JAY

452 LONG BEACH BOULEVARD, LONG BEACH
TO JOIN THEM TO GAIN UNION WAGES JOB
SECURITY AND WORKING CONDITIONS
AUTOMOTIVE PARTS AND SPECIALTY
PRODUCTS
DRIVERS, HELPERS, WAREHOUSEMEN,
TEAMSTERS
210-01 NORTHERN BOULEVARD, L.I.

Shortly after November 24, 1959, the following sign was substituted for the earlier placards (R. 28–29; 58, 70, 151):

TO THE
PUBLIC
PLEASE BE ADVISED
STAN-JAY
AUTO PARTS
DOES NOT
EMPLOY MEMBERS OF, NOR HAS ANY
CONTRACT WITH ANY LABOR UNION
INCLUDING LOCAL 239, I.B. of T.

Both before and after the "To The Public" signs were substituted, the Union continued its efforts to solicit membership among the Company's employees and to induce them to join the Union (R. 30; 116–117, 121–122, 145–146, 152–153). And, shortly before Christmas, Krieger informed employees Joe Morrison and

Ted O'Neill that the Union had set a record by picketing on Staten Island for 19 consecutive months and warned them that "he was prepared to set a new record with [Stan-Jay]" (R. 30; 121–123).[8]

When the picketing began, the Union notified the Company's suppliers that it was picketing the Company. So far as the record shows, that notice was never rescinded (R. 13, 30; 144). Accordingly, though the Company customarily received and dispatched substantial amounts of goods at its premises by means of trucks operated by outside carriers and suppliers, during the entire period of the picketing no deliveries and no pick-ups were made across the picket line (R. 13, 30; 74–75, 80, 90–91, 95–96, 107, 129, 156–158).[9] The record, moreover, is replete with specific instances where truck drivers employed by shippers and suppliers refused to make scheduled deliveries across the Union's picket line (R. 31–32; 113, 115, 124–129, 149, 153–155, 163–166, 167–168, 170–171). These specific refusals all occurred subsequent to November 13, 1959, the effective date of Section 8(b)(7), and most of them took place while the pickets were carrying the placards entitled "To The Public" (*ibid.*).

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[8] On January 14, 1960, Krieger told Morrison that if the employees could assure the Union that "around the beginning of summer" they would join the Union, then the pickets would "go around the corner" and give the Company's non-union competitor "a taste of the medicine we gave you" (R. 123–124).

[9] A few deliveries were made to the store at night, after the pickets had departed for the day (R. 30; 80, 90–91). These shipments, however, amounted to not more than ten percent of the total merchandise purchased while the picketing was in progress (R. 91).

B. THE BOARD'S DECISION AND ORDER

On November 23, 1959, ten days after the new Section 8(b)(7) became effective, the Company filed an unfair labor practice charge with the Board's Regional Director, alleging that the Union's picketing violated subparagraph (C) of that Section (R. 2). Section 8(b)(7)(C) (pp. 2–3, *supra*) bans picketing for the purpose of "forcing or requiring" an employer to recognize, or his employees to accept or select, a labor organization as the collective bargaining representative, "where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing. * * *" There are two provisos, the second of which reads:

> *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

On November 24, a copy of the charge was served, by registered mail, on the Union. On November 25, the Regional Director telegraphed the Union requesting that it advise him "immediately whether [the Union] intend[ed] to file a petition under Section 9(c)" (R. 58). The telegram further advised the

Union that, "unless such petition is filed by close of business Friday, November 27, 1959, this office contemplates issuance of a complaint herein and application for injunctive relief under Section 10(l) of the Act" (*ibid.*). When the Union failed to file a representation petition, the Regional Director, on November 30, 1959, issued the complaint which forms the basis of this proceeding (R. 3–6), and on December 2 filed a petition for injunctive relief under Section 10(l). The district court granted the petition, and on January 21, 1960, issued an order enjoining the Union's picketing pending final disposition of the unfair labor practice proceeding by the Board. *McLeod* v. *Local 239, Teamsters*, 179 F. Supp. 481, 488 (E.D. N.Y.).

On June 1, 1960, the Board issued its decision and order. Upon the facts set forth above, the Board found that "the objective of [the Union's] picketing both before and after the effective date of the new Act was the same—organization and recognition" (R. 15). The Board further found that, since the picketing "had been going on continuously for almost 2 months before the new Act became effective * * * the 17 days of additional picketing thereafter [was] a reasonable period of time [in] which to require the Respondent to file a representation petition" (R. 12). Finally, the Board found that the Union had not filed such a petition within that period, or indeed at any time during the course of the picketing, and that the picketing had continuously induced truck drivers employed by common carriers and outside suppliers "not to pick up" goods from or "deliver"

goods to the Company (R. 12–14). Accordingly, the Board concluded that the Union, by its picketing, had violated Section 8(b)(7)(C) of the Act. The Board's order required the Union to cease and desist from the unfair labor practice found and to post appropriate notices (R. 15–18).

C. THE COURT OF APPEALS DECISION

The court of appeals sustained the Board's findings and conclusions and enforced its order in full (Pet. 17–26).

ARGUMENT [10]

1. Petitioner does not seriously challenge (Pet. 10; but cf. Pet. 14–16) the finding of the Board, approved by the court below, that an object of its picketing, both before and after the enactment of Section 8(b)(7), was to organize the employees of the Company and to obtain recognition as their bargaining representative.[11] Its principal contention (Pet. 2, 9) is that the Board was in error in concluding that, in the circumstances of this case, the Union

[10] Preliminarily, it may be noted that, if the decision of the court of appeals be treated as containing the court's judgment (Pet. 17, 26), the petition for certiorari was not filed within the 90-day period specified in 28 U.S.C. 2101(c). The decision was issued on April 17, 1961, and the petition was not filed until July 26, 1961. Although a decree was entered on May 4, 1961 (Pet. 27–28), it did not revise legal rights or obligations, but was a ministerial formalization of the decision of April 17. See *Federal Trade Commission* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206.

[11] However, the facts summarized in the Statement furnish ample support for the Board's finding that the picketing had such objective, and that it had a substantial effect on deliveries to the Company.

had picketed for an unreasonable period of time without filing a representation petition when it did not file one within 17 days after Section 8(b)(7) became effective. This issue, which turns on the special facts of this case, is not of general importance and thus does not warrant review by this Court. The question of whether the Board may take into account the length of the picketing prior to the effective date of Section 8(b)(7), in determining how long the picketing may continue thereafter without a representation petition being filed, is relevant only to the small number of cases in which picketing had been in progress when the new provision took effect. And, with Section 8(b)(7) now almost two years old, it is probable that only a few of such cases are still "alive."

In any event, the Board correctly took into account the pre-Section 8(b)(7) picketing in assessing the reasonable period of time for filing a representation petition. The purpose of Section 8(b)(7)(C) is to afford a union a reasonable opportunity to use picketing as an organizational device; thereafter a Board election may fairly be held to determine whether a majority of the employees desire the union as their representative. The section sets 30 days as the maximum period for picketing without filing a representation petition, but empowers the Board to fix shorter periods as "reasonable" depending on the particular facts.[12] Since the picketing here had been going on for about 60 days prior

[12] Thus, Senator Goldwater stated (105 Cong. Rec. 19772; II Leg. Hist. of the Labor-Management Reporting and Disclosure Act of 1959, p. 1858): "[Section 8(b)(7)(C)] simply means this: A union may not picket for recognition or for organiza-

to the effective date of Section 8(b)(7), the Union had already had twice the period provided by Section 8(b)(7)(C) to build up employee support through picketing. Hence, there was no need to give it an additional 30 days for this purpose after the new provision became effective; some lesser period could appropriately be fixed by the Board; and, under the circumstances, the 17 additional days which were afforded the Union could not be viewed as insufficient.

Nor is there merit to petitioner's contention (Pet. 9) that the phrase "reasonable period" in Section 8(b)(7)(C) is so vague as to violate due process requirements. As the court below answered (Pet. 24): "The standard of 'reasonableness,' employed daily by judges and administrators in countless rules of decision, is sufficient to shield authority granted an administrative agency from constitutional attack * * *."

2. Equally insubstantial is petitioner's further contention (Pet. 10–14) that the Board erred in inter-

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tional purposes for more than a reasonable period *which may be less than 30 days if the Board so determines*, but may not be longer, without a petition for a representation election being filed with the Board. If no such petition is filed in such period then at the end thereof, but not later than the 31st day from its commencement, such picketing, if continued or resumed, becomes an unfair labor practice." (Emphasis added.)

Similarly, Representative Griffin, co-sponsor of the provision and a member of the Conference Committee, stated in explaining the Conference bill to the House (105 Cong. Rec. 18153; II Leg. Hist. 1812): "Of course, the picketing may be enjoined in less than 30 days if the Board finds the circumstances are such as to make it unreasonable to permit it to continue and it must be stopped at the end of 30 days."

preting "forcing or requiring" in Section 8(b)(7) (p. 2, *supra*) as encompassing peaceful picketing for recognition or organizational purposes. The legislative history makes it plain that Congress did not intend to restrict that provision to situations where picketing was accompanied by force and violence.[11] Moreover, as the court below observed (Pet. 22), the language of the provision is not inconsistent with this purpose for it is "clear that 'forcing or requiring' refers to the intended effect of the picketing, not the manner in which the picketing is carried on, to the 'object', not the method * * *."

The conclusion that Section 8(b)(7) encompasses peaceful picketing for recognition or organizational purposes is not in conflict with the decisions of this Court in *National Labor Relations Board* v. *Drivers*

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[11] As Representative Griffin stated, in explaining Subsection 705(c) of the Landrum-Griffin bill, the precursor to Section 8(b)(7) (105 Cong. Rec. 14348; II Leg. Hist. 1523): "[This provision] embodies a major reform. It is intended to prohibit blackmail recognition picketing by unions which do not represent the employees. * * * The customary method employed to force employers [to sign bargaining contracts irrespective of the contrary wishes of the employees] is to place picket lines around their plant or shops. Such picketing *even when peaceful*, will frequently cause small employers to capitulate. The picket line is a signal for truckers not to pick up or deliver goods to employees of maintenance contractors. Pickets also deter many customers from entering retail or service establishments. In the face of such tactics employees whose jobs are in jeopardy as they see their employer's business choked off are soon coerced into joining the picketing union—even though they might prefer another union. In many such cases their employer forces them in a particular union by signing a compulsory membership agreement with the picketing union." (Emphasis added.)

Local No. 639 (Curtis Bros.), 362 U.S. 274, and *Local 761, International Union of Electrical Workers* v. *National Labor Relations Board (General Electric Co.)*, 366 U.S. 667 (Pet. 9, 11–12). In *Curtis*, the Court merely held that Congress did not intend to reach peaceful picketing for recognitional purposes in Section 8(b)(1)(A) of the Taft-Hartley Act, for that provision was only aimed at "union tactics involving violence, intimidation, and reprisal or threats thereof" (362 U.S. at 290). The Court did not decide that such picketing was not encompassed in Section 8(b)(7), which had not even been enacted when the picketing of Curtis occurred. Indeed the Court specifically noted (362 U.S. at 291) that, by enacting the recent Section 8(b)(7)(C), Congress had gone beyond the Taft-Hartley Act and legislated "a comprehensive code governing organizational strikes and picketing," which "draws no distinction between 'organizational' and 'recognitional' picketing" and proscribes "*peaceful organizational strikes* in many situations * * *." (Emphasis added.) Similarly, *Local 761* merely involved the question of whether certain picketing was within the scope of Section 8(b)(4)(A), the secondary boycott provision of the Act; no question was presented in that case as to application or scope of Section 8(b)(7).

Finally, to hold that the picketing in this case was violative of Section 8(b)(7)(C) presents no substantial constitutional question (Pet. 13–14). The Board and the court below found that the picketing was conducted for the purpose of forcing the employer to recognize, and the employees to select, the union as the collective bargaining representative, and that it

caused a complete cessation of normal deliveries and shipments to the employer's business. The legislature clearly has power to regulate picketing of this type, in these circumstances. See *Building Service Employees Union* v. *Gazzam*, 339 U.S. 532; *Teamsters* v. *Vogt*, 354 U.S. 284; cf. *Electrical Workers* v. *National Labor Relations Board*, 341 U.S. 694, 705.

3. The question as to whether Section 8(b)(7) reaches picketing which is conducted solely for the purpose of protecting union standards (Pet. 14–16) is not presented on this record. As shown, the Board and the court below found, and the evidence summarized in the Statement amply supports the finding, that the Union's object, at all times, was to force the employer to recognize, and the employees to select, it as the bargaining agent. Indeed, petitioner appears to concede the validity of this finding for the purposes of most of its petition (see Pet. 10).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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